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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte YU ZHENG

Appeal 2009-001021
Application 10/637,097
Technology Center 3600

Decided¹: May 29, 2009

Before JAMESON LEE, SALLY GARDNER LANE and SALLY C.
MEDLEY, *Administrative Patent Judges*.

MEDLEY, *Administrative Patent Judge*.

DECISION ON APPEAL

¹ The two month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

A. STATEMENT OF THE CASE

Patent Category Corp. (“PC”), the real party in interest, seeks review under 35 U.S.C. § 134(a) of a Final Rejection of claims 18, 20-23 and 28. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

References Relied on by the Examiner

Springer et al. (“Springer”)	5,249,593	Oct. 5, 1993
Wan	5,411,046	May 2, 1995
Zheng (“Zheng ‘385”)	5,560,385	Oct. 1, 1996
Zheng (“Zheng ‘799”)	5,579,799	Dec. 3, 1996

Rejections on Appeal

The Examiner rejected claims 18, 20-23 and 28 as unpatentable under 35 U.S.C. § 103(a) over Springer and Wan.

The Examiner rejected claims 18, 20-22 and 28 on the grounds of obviousness-type double patenting over Zheng ‘799.

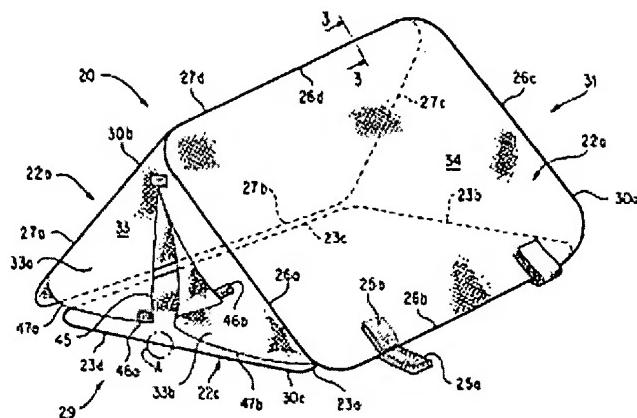
The Examiner rejected claims 18, 20-23 and 28 on the grounds of obviousness-type double patenting over Zheng ‘385.

Claims 18, 20-23 and 28 stand or fall together. Br 11-19.

The Invention

PC discloses, referring to PC’s figure 1 reproduced below [numbers from **figure 1 inserted**], a collapsible structure [20] that includes a side member [22a], [22b] and a base member [22c] each including a foldable frame member. The base member [22c] and side member [22a], [22b] are connected at an acute angle. The collapsible structure also includes first and second frame retaining sleeves [30a], [30b], [30c] for retaining the frame members [not shown]. Spec. 2-7.

PC's figure 1 is below:



PC's figure 1 depicts a collapsible structure.

Claim 18, reproduced from the Claim Appendix of the Appeal Brief, is as follows:

A collapsible structure having a deployed configuration and a collapsed configuration, comprising:

a side member and a base member, each member including a foldable frame member that has a folded and an unfolded orientation, and a separate fabric material covering at least a portion of its respective frame member when the respective frame member is in the unfolded orientation, with each frame member forming a plurality of concentric rings when the frame member is in the folded orientation;

the side member having a bottom side, and the base member having a first side, with the side member and the base member connected to each other adjacent the bottom side of the side member and the first side of the base member at an acute angle when the structure is in the deployed configuration;

wherein the side member and the base member are flat when the structure is in the deployed configuration with the base member resting on a surface; and

a first frame retaining sleeve for retaining most of the length of the frame member for the side member, and a second frame retaining sleeve for retaining most of the length of the frame member for the base member, the frame members for the side member and the base member being individually retained in different frame retaining sleeves.

B. ISSUES

1. Has PC shown that the Examiner erred in determining that the claims would have been obvious based on the Examiner's rationale for combining Springer and Wan?
2. Has PC shown that the Examiner erred in determining that PC's claims are obvious variants of the Zheng '799 Patent claims and the Zheng '385 Patent claims?

C. FINDINGS OF FACT

1. A panel is defined as: "[a] flat, usually rectangular piece forming a raised, recessed, or framed part of the surface in which it is set." THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004).

Springer

2. Springer describes, referring to Springer's figure 2 reproduced below [numbers from **figure 2** inserted], a tent including a frame formed by two oval bands [32], [34] joined together by a plurality of spring connectors [36]. Col. 1, ll. 59-68.

Springer's figure 2 is below:

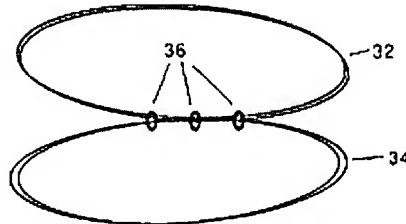


Figure 2 depicts the frame of a tent.

3. Oval bands [32],[34] are formed of resilient material, such as spring steel stock and can be twisted until the bands coil upon themselves. Col. 3, ll. 32-52; fig. 4.

4. The outer covering of the tent is composed of sheet material, such as rip-stop nylon or other flexible, durable and convenient sheet material normally used for a tent or shelter use. Col. 1, ll. 44-48.

Wan

5. Wan describes, referring to Wan's figure 3A reproduced below, [numbers from **figure 3A** inserted], a tent with wall panels [30], each panel consisting of foldable material and having peripheral channels [31] in which a coilable wire is constrained and provides the supporting frame for its respective wall. Col. 2, ll. 56-62.

Wan's figure 3A is below:

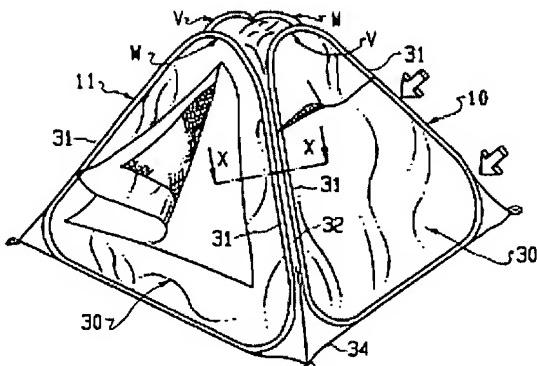


Figure 3A depicts a tent.

6. An elongate strip of foldable material [32] extends along the sides and between each adjacent pair of frames and provides a loose hinged connection between respective adjacent sides of the panels [30]. Col. 2, ll. 64-67.
7. Wan's describes, referring to Wan's figure 4, reproduced below, [numbers from **figure 4** inserted], each frame is formed by coilable wire [40] that is housed in a pocket or channel provided by an enclosure formed of braided material [41].

Wan's figure 4 is below:

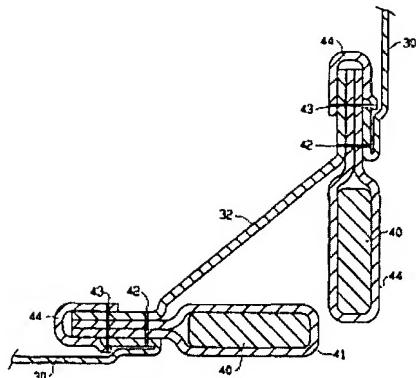


Figure 4 depicts the connection of the walls of the tent.

8. Stitching [42], [43] joins and holds material [41] together and holds the walls [30] and the edges of the strip [32] inside a protective cover of braided material [41]. Col. 3, ll. 57-64

D. PRINCIPLES OF LAW

Obviousness

The Supreme Court has rejected the rigid application of the “teaching, suggestion, or motivation” (TSM) test, instead favoring an “expansive and flexible approach.” *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415 (2007). It is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. *Id.* at 418.

Based on its precedent, the Court reaffirmed the principle that “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 416. Illustrative of this principle is *United States v. Adams*, 383 U.S. 39 (1966), where “[t]he Court recognized that when a[n] [application] claims a structure already known in the prior art that is altered by the mere

substitution of one element for another known in the field, the combination must do more than yield a predictable result. *KSR* at 416 (citing *Adams* at 50-51).

The Court in *KSR* further explained that “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.” *Id.* at 417. “A person of ordinary skill is also a person of ordinary creativity, not an automaton.” *Id.* at 421.

On the issue of hindsight, the Federal Circuit explains:

Any judgment on obviousness is in a sense necessarily a reconstruction based on hindsight reasoning, but so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made and does not include knowledge gleaned only from applicant’s disclosure, such a reconstruction is proper.

In re McLaughlin, 443 F.2d 1392, 1395 (CCPA 1971).

Obviousness-Type Double Patenting

An obviousness-type double patenting analysis entails two steps. First, the claims in the earlier patent and the claims in the application are construed and the differences between the claims are determined. Second, a determination is made as to whether the differences in subject matter between the two claims render the claims patentably distinct. *Eli Lilly & Co. v. Barr Laboratories, Inc.*, 251 F3d 955, 968 (Fed. Cir. 2001) (citations omitted). “A later [] claim is not patentably distinct from an earlier patent claim if the later claim is obvious over, or anticipated by, the earlier claim.” *Id.* (citations omitted).

“It is well settled that the recitation of a new intended use for an old product does not make a claim to that old product patentable.” *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997) (a “structure [that] will be used to dispense popcorn does not have patentable weight if the structure is already known, regardless of whether it has ever been used in any way in connection with popcorn.”).

E. ANALYSIS

Obviousness over Springer and Wan

Independent claim 18 recites: “a side member and a base member, each member including a foldable frame member . . . , and a separate fabric material . . . ; and a first frame retaining sleeve . . . , and a second frame retaining sleeve” Br. 21.

The Examiner finds that Springer describes a side member [32] and a base member [34] hingedly connected via connectors [36]. Final Rejection 6; Ans. 5; *see* FF² 2. The Examiner further finds that the side member [32] and base member [34] are foldable and include fabric. Final Rejection 6; Ans. 5; *see* FFs 3-4. The Examiner does not rely on Springer for describing frame retaining sleeves or that each frame includes separate fabric. Final Rejection 6; Ans. 5. Instead, the Examiner finds that Wan describes using sleeves [41], [32] and stitching [42], [43] to hingedly attach collapsible framed members [30] together, and the framed members [30] each include separate fabric material. Final Rejection 6; Ans. 5; *see* FFs 5-8. The Examiner concluded that it would have been obvious to one with ordinary skill in the art at the time the invention was made to modify Springer’s structure by using Wan’s sleeve/stitching members [32], [41], [42], [43]

² FF denotes Finding of Fact.

instead of Springer’s connectors [36], since Wan’s hinge means are functionally equivalent and would work equally well between Springer’s members [32], [34]. Final Rejection 6; Ans. 5. The Examiner further finds that if the material and sleeves of Wan are used with the foldable frames of Springer, the structure of the assembly as a whole would be simplified by using fewer separate parts to form the structure and also would result in a more supportive hinge because it would extend the entire length of Springer’s members [32], [34]. Final Rejection 6; Ans. 5.

PC argues that Springer does not disclose a separate piece of fabric for each frame member. Br. 17. The argument is without merit. As noted above, the Examiner relied on Wan for the “separate fabric material” limitation, not Springer.

PC argues that the Examiner’s determination of obviousness is based on speculation and conjecture and is not based on any evidence or well known facts. Br. 18. PC contends that a person skilled in the art would not find it obvious to modify Springer in the manner suggested by the Examiner since Wan and Springer are based upon such different underlying construction. Br. 17-18.

PC’s arguments are rejected. In determining whether there is a reason to combine, it is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. The combination of Springer’s structure with Wan’s frames having separate material and sleeves/stitching forming hinge means amounts to substitutions of one element for another known in the field. The substitution of one element for another known in the field is obvious if it

does no more than yield a predictable result. PC does not direct us to evidence to demonstrate that substituting Wan's sleeve/stitching members [32], [41], [42], [43] for Springer's connector [36] and substituting Wan's framed members [30] having separate fabric for Springer's fabric covered members [32], [34] would yield unpredictable results. PC's also does not direct us to evidence to demonstrate that the combination is beyond the level of skill of one with ordinary skill in the art. Moreover, PC's argument that a person skilled in the art would not find it obvious to modify Springer in the manner suggested by the Examiner is conclusory since PC does not direct us to objective evidence, such as expert testimony, to support its argument.

Argument of counsel cannot take the place of evidence lacking in the record. *Meitzner v. Mindick*, 549 F.2d 775, 782 (CCPA 1977).

PC further argues that any attempt to combine Springer and Wan would be a result of hindsight construction. Br. 18. PC's arguments are unpersuasive because they do not explain how the proposed modification includes knowledge gleaned only from PC's disclosure. As already explained, the proposed modification is based on the knowledge and ordinary creativity of one skilled in the art to substitute one element for another known in the field.

For all these reasons, PC has not demonstrated that the Examiner erred in determining that claims 18, 20-23 and 28 would have been obvious over Springer and Wan.

Obviousness-Type Double Patenting over Zheng '799

The Examiner finds that PC's claims 18, 20-22 and 28 are not patentably distinct from claims 1-5 and 9-12 of the Zheng '799 Patent. Final Rejection 4; Ans. 4 For the sake of convenience, the pertinent portions of

PC's independent claim 18 and independent claim 1 of the Zheng '799 Patent are reproduced below (disputed limitations in italics).

18. A collapsible structure having a deployed configuration and a collapsed configuration, comprising:

a side member and a base member, each member including a foldable frame member that has a folded and an unfolded orientation . . . ;

the side member having a bottom side, and the base member having a first side, with *the side member and the base member connected to each other adjacent the bottom side of the side member* and the first side of the base member at an *acute angle* when the structure is in the deployed configuration;

wherein the side member and the base member are *flat* when the structure is in the deployed configuration with *the base member resting on a surface* . . .

1. A collapsible shade structure supported on a surface for defining and *enclosing an interior space*, the shade structure comprising:

at least three foldable frame members each having a folded and an unfolded orientation, each frame member comprising three sides . . . ;

a fabric material substantially covering the frame members to form a side panel for each frame member, each side panel assuming the unfolded orientation of its associated frame member;

each frame member and its associated side panel having a first side connected to an adjacent frame member and its associated side panel by first interconnecting hinge means and a second side connected to another adjacent frame member and its associated side panel by second interconnecting hinge means; and

the frame members and their associated side panels held together to form an *enclosed interior space* . . .

The Examiner determined that it would have been obvious to modify the invention claimed in Zheng '799 by adding the fabric material onto the

frame so that the material and the frame form a flat structure, for aesthetic reasons. Final Rejection 4; Ans. 4. The Examiner also determined that it would have been obvious to position the adjacent panels of the Zheng ‘799 claims in various configurations, including at acute angles with respect to one another, depending on the structural shape desired.

First, PC argues that its Application claims are distinct because Zheng ‘799 claims at least three side panels while PC only claims two members (or panels). Br 11-12. PC’s arguments are unpersuasive. The recitation of two members in PC’s claims is described by the “at least three panels” of the Patent claims since three panels necessarily include two panels. The question is whether the Application claims are obvious over, or anticipated by, the Patent claims; not whether the claims have identical scope.

Next, PC argues that claim 18 recites the following limitations that are different from or not found in the Zheng ‘799 claims: (1) a side member **connected at its bottom side to a base member**; and (2) the base member rests on a surface when the structure is in the deployed configuration. Br. 12 (emphasis in original).

PC’s arguments are unpersuasive. The disputed claim 18 recitations merely describe the positioning of the “members”. A new use (i.e., a new position) for an old product does not make a claim to that old product patentable. The product described in PC’s claims is described by Zheng’s claims. Zheng’s claim 1 recites “at least three foldable frame members . . . each frame member having a first side connected to an adjacent frame member”. PC does not direct us to evidence to demonstrate that the recitation of the “the base member resting on a surface” or the use of the positional terms “base” or “bottom” distinguish the structure of the claim 18

product over Zheng's claim 1 product. That is, both the Zheng claim 1 and PC's claim 18 describe two members connected together. That PC's claim 18 refers to one member as a base that is connected to the bottom side of the side member and where the base member rests on a surface does not *structurally* distinguish that claim from Zheng's claim 1.

PC also argues that claim 18 recites the following limitations that are not found in Zheng's claims: (1) **flat** members; and (2) the base member and the side member are connected to each other at an **acute angle**. Br. 12 (emphasis in original). PC's arguments are unpersuasive because the Examiner acknowledges that these limitations are not present in Zheng's claims. Final Rejection 4, Ans. 4. To account for these differences, the Examiner determined that it would have been obvious to (1) position the adjacent panels in various configurations, including acute angles with respect to one another; and (2) add the fabric material onto the frame so that the material and the frame form a flat structure for aesthetic reasons. Final Rejection 4; Ans. 4. The Examiner's rationale is reasonable and PC does not specifically point out any errors in that rationale. Moreover, the "flat" limitation is described by the "panel" recitations in Zheng's claims because a panel is defined as a flat, usually rectangular piece forming a raised, recessed, or framed part of the surface in which it is set. FF 1.

PC further argues that claim 18 does not recite enclosing any interior space. PC's argument is misplaced. The recitation of enclosing an interior space found in Zheng's claims results in a narrower claim scope than PC's claim 18. PC's claim 18 is broader with respect to this limitation because it is open-ended due to the use of the transitional phrase "comprising" and does not preclude "enclosing an interior space". A claim of narrower scope

meets the limitations of a broader claim. Again, the question is whether the Application claims are obvious over, or anticipated by, the Patent claims; not whether the claims have identical scope.

Last, PC argues that the numerous differences between the claimed inventions make it impossible for a person of ordinary skill in the art to conclude that the invention defined in claim 18 would have been an obvious variation of the Zheng '799 claims and the only way one could have done so is through the use of hindsight. Br. 13. PC's arguments are conclusory and unpersuasive. The arguments fail to provide a meaningful explanation as to why the Examiner erred in determining that PC's Application claims are an obvious variant of Zheng's Patent claims.

For all these reasons, PC has not demonstrated that the Examiner erred in determining that claims 18, 20-22 and 28 are not patentably distinct from claims 1-5 and 9-12 of the Zheng '799 Patent.

Obviousness-type Double Patenting over Zheng '385

The Examiner finds that PC's claims 18, 20-23 and 28 are not patentably distinct from claims 1, 2 and 5 of the Zheng '385 Patent. Final Rejection 4-5; Ans. 4-5. For the sake of convenience, the pertinent portions of PC's independent claim 18 and Zheng's independent claim 1 are reproduced below (disputed limitations in italics).

18. A collapsible structure having a deployed configuration and a collapsed configuration, comprising:

a side member and a base member, each member including a foldable frame member that has a folded and an unfolded orientation . . . ;

the side member having a bottom side, and the base member having a first side, with *the side member and the base member connected to each other adjacent the bottom side of the side*

member and the first side of the base member at an *acute angle* when the structure is in the deployed configuration;

wherein the side member and the base member are *flat* when the structure is in the deployed configuration with *the base member resting on a surface . . .*

1. A collapsible play structure adapted to be supported on a surface and comprising:

at least three foldable frame members, each having a folded and an unfolded orientation;

a fabric material substantially covering each frame member to form a side panel for each frame member when the frame member is in the unfolded orientation, the fabric assuming the unfolded orientation of its associated frame member;

each side panel and its frame member having a *square configuration* and *comprising four sides*, including a left side, a right side, a bottom side . . . ;

wherein the left side of each side panel is hingedly connected to the right side of an adjacent side panel, and the right side of each side panel is hingedly connected to the left side of another adjacent side panel; and

wherein the bottom side of each side panel is adapted to rest on the surface to support the play structure.

The Examiner makes identical obviousness determinations as those discussed before for the Zheng '799 Patent. See Final Rejection 4-5; Ans. 4-5. PC presents nearly identical arguments directed to the claims of Zheng '385 as those directed to the claims of Zheng '799. Compare Br. 13-15 with Br. 11-13. As already explained, such arguments are not persuasive.

Identical to arguments already addressed, PC argues that claim 18 recites the following limitations that are different from or not found in the Zheng '385 claims: (1) a side member **connected at its bottom side to a base member**; and (2) the base member rests on a surface when the structure is in the deployed configuration. Br. 14 (emphasis in original). Claim 1 of

Zheng ‘385 recites “at least three foldable frame members . . . fabric material . . . covering each frame member to form a side panel for each frame member . . . wherein the left side of each side panel is hingedly connected to the right side of an adjacent side panel . . .”. For similar reasons explained before with respect to Zheng ‘799, we find that PC’s product, which structurally amounts to a first member and a second member connected to each other adjacent a side of the first member, is described by claim 1 of Zheng ‘385.

Similar to arguments addressed before regarding the Zheng ‘799 Patent, PC argues that claim 18 does not recite (1) members that are connected to each other along their left and right sides; (2) a bottom side for each side panel that rests on a surface to support the structure; and (3) square panels or members as recited in Zheng ‘385. Br. 13-14. PC’s arguments are misplaced because the disputed recitations found in Zheng ‘385 claim 1 results in a narrower claim scope than PC’s claim 18. PC’s claim 18 is broader with respect to these limitations because it is open-ended due to the use of the transitional phrase “comprising”. PC’s claim 18 is also broader because it does not have limitations that preclude: (1) the members from being connected along their left and right sides; (2) a bottom side of each member (or panel) from resting on a support surface; and (3) the member (or panel) and frame from having a “square configuration”. As explained before, a claim of narrower scope meets the limitations of a broader claim.

For all these reasons, in addition to those discussed above with respect to Zheng ‘799, PC has not demonstrated that the Examiner erred in determining that claims 18, 20-23 and 28 are not patentably distinct from claims 1, 2 and 5 of the Zheng ‘385 Patent.

F. CONCLUSION

1. PC has not shown that the Examiner erred in determining that the claims would have been obvious based on the Examiner's rationale for combining Springer and Wan.
2. PC has not shown that the Examiner erred in determining that PC's claims are obvious variants of the Zheng '799 Patent claims and the Zheng '385 Patent claims.

G. ORDER

The Examiner's rejection of claims 18, 20-23 and 28 as unpatentable under 35 U.S.C. § 103(a) over Springer and Wan is affirmed.

The Examiner's rejection of claims 18, 20-22 and 28 on the grounds of obviousness-type double patenting over Zheng '799 is affirmed.

The Examiner's rejection of claims 18, 20-23 and 28 on the grounds of obviousness-type double patenting over Zheng '385 is affirmed.

No time period for taking any subsequent action in connection with the appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

ack

cc:

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Tustin, CA 92782

Notice of References Cited		Application/Control No.	Applicant(s)/Patent Under Reexamination of a Patent Appeal No. 2009-1021	
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U.S. PATENT DOCUMENTS

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pan·el (pān'ĕl) ?

n.

1. A flat, usually rectangular piece forming a raised, recessed, or framed part of the surface in which it is set.
2. The space or section in a fence or railing between two posts.
3. A vertical section of fabric; a gore.
4.
 - a. A thin wooden board, used as a surface for an oil painting.
 - b. A painting on such a board.
 - c. A board having switches or buttons to control an electric device.
 - d. An instrument panel.
 - e. The complete list of persons summoned for jury duty.
 - f. Those persons selected from this list to compose a jury.
 - g. A jury.
 - h. A group of people gathered to plan or discuss an issue, judge a contest, or act as a team on a radio or television quiz program.
 - i. A discussion by such a group.
5.
 - a. A board having switches or buttons to control an electric device.
 - b. An instrument panel.
 - c. The complete list of persons summoned for jury duty.
 - d. Those persons selected from this list to compose a jury.
 - e. A jury.
 - f. A group of people gathered to plan or discuss an issue, judge a contest, or act as a team on a radio or television quiz program.
 - g. A discussion by such a group.
6. A section of a telephone switchboard.
7. A cartoon drawing in a sequence of cartoons that form a narrative.
8. *Law*
 - a. The complete list of persons summoned for jury duty.
 - b. Those persons selected from this list to compose a jury.
 - c. A jury.
 - d. A group of people gathered to plan or discuss an issue, judge a contest, or act as a team on a radio or television quiz program.
 - e. A discussion by such a group.
9.
 - a. A group of people gathered to plan or discuss an issue, judge a contest, or act as a team on a radio or television quiz program.
 - b. A discussion by such a group.

tr.v. **pan·eled** or **pan·elled**, **pan·el·ing** or **pan·el·ling**, **pan·els**

1. To cover or furnish with panels.
2. To decorate with panels.
3. To separate into panels.
4. *Law* To select or impanel (a jury).

[Middle English, *piece of cloth*, from Old French, probably from Vulgar Latin **pannellus*, diminutive of Latin *pannus*, *cloth*; see pan- in Indo-European roots.]

The American Heritage® Dictionary of the English Language, Fourth Edition

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